STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
The Hon. Patrick M. Meter, Colleen A. O'Brien, and Brock A. Swartzle

ESURANCE PROPERTY & CASUALTY INSURANCE COMPANY,

Plaintiff-Appellant,

v

MICHIGAN ASSIGNED CLAIMS PLAN and MICHIGAN AUTOMOBILE INSURANCE PLACEMENT FACILITY,

Defendants-Appellees.

Supreme Court No. 160592

Court of Appeals No. 344715

Circuit Court No. 17-016798-NF

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PLAINTIFF-APPELLANT ESURANCE PROPERTY & CASUALTY INSURANCE COMPANY'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

STATUTES

COURT RULES

ARGUMENT

Plaintiff-Appellant Esurance Property and Casualty Insurance Company ("Esurance") seeks leave to appeal from the Court of Appeals' decision to affirm the Wayne County Circuit Court's dismissal of this equitable subrogation suit. *Esurance v MAIPF,* ___ Mich App ____, ___; ___ NW2d ___ (2019) (Docket No. 344715). (Appx 6a.) The trial court granted the Motion for Summary Disposition brought by Defendants-Appellees Michigan Assigned Claims Plan and Michigan Automobile Insurance Placement Facility (hereinafter collectively "MAIPF") under MCR 2.116(C)(8). (Id.) On September 23, 2020, this Court directed "the Clerk to schedule oral argument on the application." (Appx 123a.) That Order also directed Esurance to submit a supplemental brief "addressing whether a finding that an insurance policy was void *ab initio* because it was procured by fraud bars a subsequent claim for equitable subrogation for benefits that were paid pursuant to that policy before it was found to be void." (Id.)

The short answer is "no." The fact that Esurance rescinded its policy is no bar to this subrogation action. This Court will recall that Esurance paid a significant amount on the underlying claimant's no-fault claim, then rescinded the policy based on fraud in the procurement and pursued subrogation against what would have been the higher-in-priority carrier. (Appx 7a.) The Court of Appeals erroneously found, among other things, that "[i]f the policy never existed" – because the rescission rendered it void *ab inito* – "then plaintiff [Esurance] was a mere volunteer when it paid $571,000 in PIP benefits." (Appx 10a.) But an insurer does not act as a volunteer when it is mistaken (or in this case, misled by its insured) about its obligation to pay. See *DAIIE v Detroit Mut Auto Ins Co,* 337 Mich 50, 53-54; 59 NW2d 80 (1953). See also *Maryland Cas Co v Transamerica Ins Corp of Am,* 199 Mich App 561, 564–565; 502 NW2d 749 (1993) (no-fault carrier was not a "volunteer" when it "had at least an

arguable duty to pay…."); *Cent Michigan Bd of Trustees v Employers Reinsurance Corp*, 117 F Supp 2d 627, 638 (ED Mich, 2000) ("the 'volunteer' limitation is generally inapplicable to an insurer seeking contribution from a co-insurer…."). An "insurer who pays a claim for which it is not legally responsible may be entitled to equitable subrogation," so long as the insurer had "a reasonable but *incorrect* belief that they owed…." *MGA Entmt, Inc v Hartford Ins Group*, 869 F Supp 2d 1117, 1133-1134 (CD Cal, 2012) (emphasis in original, citation omitted). An "insurer is not a volunteer for purposes of equitable subrogation where it 'pays on the good faith, reasonable belief it might be liable' to the insured, even if the insurer maintains that a court will ultimately conclude the insurer has no liability." *Id.* at 1131 n 9 (citation omitted).

This Court has defined a "volunteer" as "one who intrudes himself into a matter which does not concern him, or one who pays the debt of another without request, when he is not legally or morally bound to do so, and when he has no interest to protect in making such payment." *DAIIE*, 337 Mich at 53-54. But a "payment is not voluntary when made under compulsion, under a moral obligation, *in ignorance of the real state of facts, or under an erroneous impression of one's legal duty*." *Id.* at 54 (emphasis added). See also *Niecko v Emro Mktg Co*, 769 F Supp 973, 983 (ED Mich, 1991), aff'd 973 F2d 1296 (CA 6, 1992).

That is precisely what happened here – Esurance issued a policy and made payments based on "ignorance of the real state of facts" *because of its insured's material misrepresentations* in the application for insurance. (See Appx 7a; Appx 80a.) The Macomb County Circuit Court declared the policy "void *ab initio* for misrepresentation and fraud in the application for insurance." (Appx 80a.) This kind of fraud is, by its very nature, something that an insurer cannot be expected to uncover in processing an application for insurance. See *Titan Ins Co v Hyten*, 491 Mich 547, 567; 817 NW2d 562 (2012) ("Risk assessment and the

uncovering of fraud are distinct insurance processes….")[1] So at the time Esurance paid, it was ignorant of the "real state of facts" (that the policy was fraudulently procured and subject to rescission) and "under an erroneous impression" that it had a legal duty to cover Roshaun's PIP benefits. See *Fed Ins Co v Hartford Steam Boiler Inspection & Ins Co*, 415 F3d 487, 494–495 (CA 6, 2005). As such, Esurance "was not a volunteer, and its claim for equitable subrogation" should proceed. *Id*. at 495.[2] See also *Jamestown Mut Ins Co v Nationwide Mut Ins Co*, 277 NC 216, 222; 176 SE2d 751 (1970) ("It is sufficient to invoke doctrine of subrogation if (1) The obligation of another is paid; (2) for the purpose of protecting some real *or supposed* right or interest of his own.") (emphasis added); *Katschor v Ley*, 153 Kan 569; 113 P2d 127, 135 (1941) (same).

Other jurisdictions have found that an insurer's payment is "presumptively involuntary for subrogation purposes," *Keck, Mahin & Cate v National Union Fire Ins Co*, 20 SW3d 692, 702 (Tex 2000), under circumstances analogous to this case – that being, where an insurer pays a claim "under a reasonable belief that the payment is necessary to its protection…." *Id*. See also *Sun Valley Fin Serv of Phoenix, LLC v Guzman*, 212 Ariz 495, 499; 134 P3d 400 (2006) ("a person is not a volunteer ... if he pays the debt believing the debt must be paid to protect his

[1] "Michigan's common law has consistently defined the elements of fraud without reference to whether the fraud could, upon the exercise of reasonable diligence in carrying out further investigation, have been discovered by the party claiming that it was harmed by the fraud." *Titan*, 491 Mich at 570 (citations omitted). "To hold an insurer to a different and higher standard, one that would require it affirmatively to investigate the veracity of all representations made by its contracting partners before it could avail itself of these remedies, would represent a substantial departure from the well-established understanding of fraud." *Id*. at 571.

[2] "At the time each payment was made, Federal was ignorant of the 'real state of facts' … and 'under an erroneous impression' that it had a legal duty to compensate Norquick under the Business Income And Extra Expense provision of its policy." *Fed Ins Co*, 415 F3d at 495.

interests, even though it may ultimately be determined payment was unnecessary"); *State Farm Mut Auto Ins Co v Northwestern Nat Ins Co,* 912 P2d 983, 986 (Utah 1996) (payment is not considered voluntary when an insurer has "a reasonable or good faith belief in an obligation [to make] that payment"); *Weir v Federal Ins Co,* 811 F2d 1387, 1395 (CA 10, 1987) (same).

Here, Esurance was operating under a good faith belief, at the time it paid Roshaun's claim, that it was the responsible carrier. Esurance was required to adjust Roshaun's claim under threat of "penalty interest of twelve percent on covered benefits that are not paid within thirty days of receipt of reasonable proof of loss." *Auto Club Ins Ass'n v New York Life Ins Co,* 440 Mich 126, 133; 485 NW2d 695 (1992), citing MCL 500.3142. "This penalty is in addition to statutory interest payable under MCL 600.6013." *Auto Club*, 440 Mich at 133. "Further, § 3148 provides for assessment of attorney fees if the court finds that a no-fault insurer has unreasonably delayed in making benefit payments." *Auto Club*, 440 Mich at 133. "Particularly in the light of such incentives, it is clear that" Esurance "was protecting its own interests and did not act as a volunteer when it paid the medical expenses" of Roshaun Edwards. See I*d.*

When it paid Mr. Edwards' claim, Esurance was not only operating under "ignorance of the real state of facts," but also under "an erroneous impression of one's legal duty." See *DAIIE,* 337 Mich at 54. It bears repeating that this was a January 10, 2016 accident (Appx 41a), and Esurance obtained an order rescinding its policy on March 20, 2017 (Appx 80a). Roshaun Edwards was not the insured and therefore would have arguably been an innocent third-party. See *Bazzi v Sentinel Ins Co*, 502 Mich 390; 919 NW2d 20 (2018). But the effect of rescission on so-called innocent third-parties in the no-fault context was hotly contested in the six years between this Court's release of *Titan*, 491 Mich at 547 in 2012 and this Court's Bazzi decision. On October 28, 2014, this Court directed the Court of Appeals to consider the issue, after the

Court of Appeals had denied an interlocutory application. *Bazzi v Sentinel Ins Co,* 497 Mich 886; 854 NW2d 897 (2014). On June 16, 2016, the Court of Appeals found that the innocent third-party rule had been abrogated by *Titan*, 491 Mich at 547, so innocent third-parties could not seek PIP benefits under a rescinded policy. *Bazzi v Sentinel Ins Co,* 315 Mich App 763; 768; 891 NW2d 13 (2016). But that ruling was subject to a vigorous dissent. *Id.* at 789 (Beckering, J., dissenting). After this Court granted leave on May 17, 2017, *Bazzi v Sentinel Ins Co*, 500 Mich 990; 894 NW2d 590 (2017), the matter hung in the balance until this Court issued its *Bazzi* decision on July 18, 2018. In this context, Esurance had no guarantee that it could even rescind a no-fault policy for fraud in the inducement, much less any certainty about what effect that rescission would have on this claimant.[3] Therefore, paying Roshaun's claim was the only prudent course, in light of the potential penalties described above. Again, this uncertainty does not make Esurance a volunteer so as to negate its subrogation rights. To the contrary, this uncertainty illustrates the important function that subrogation plays in furthering the goals of the No-Fault Act. See *St John Macomb-Oakland Hosp v State Farm Mut Auto Ins Co*, 318 Mich App 256, 267; 896 NW2d 85 (2016).

Equitable subrogation plays a critical role in furthering "the no-fault act's purpose of providing assured, adequate, and prompt recovery…." *Id.* For decades the Court of Appeals has directed no-fault carriers to pay claims first and sort out priority issues between carriers later – with the assurance that erroneous payments could be recovered from a higher-in-priority carrier through equitable subrogation. See *Allstate Ins Co v Citizens Ins Co of Am*, 118 Mich App 594, 603-604; 325 NW2d 505 (1982) ("whenever a priority question arises between two insurers, the

[3] Esurance also had no way of knowing that its insured and the claimant would fail to appear for, or otherwise defend, Esurance's declaratory judgment action.

preferred method of resolution is for one of the insurers to pay the claim and sue the other in an action of subrogation"). This has been the mechanism through which insurers who are presented with claims, but might not be the responsible carrier, could avoid 12% penalty interest under and attorney fees. See *U of M Regents v State Farm,* 250 Mich App 719, 737; 650 NW2d 129 (2002) ("when the only question is which of two insurers will pay, it is unreasonable for an insurer to refuse payment of benefits").[4] See also *Bloemsma v Auto Club Ins Ass'n,* 174 Mich App 692, 697; 436 NW2d 442 (1989) (a "dispute of priority among insurers will not excuse the delay in making timely payment"). Denying an insurer subrogation when it pays under a policy it later rescinds would either de-incentivize the timely payment of benefits, nullify *Bazzi*,[5] or both.

Moreover, the Court of Appeals' finding that subrogation is unavailable in this context fails to account for the fact that "[e]quitable subrogation is a flexible, elastic doctrine of equity." *Hartford Accident & Indemnity Co v Used Car Factory, Inc,* 461 Mich 210, 215; 600 NW2d 630 (1999). "Subrogation" denotes "two different kinds of rights, those that are transferred in effect by way of contractual assignment and those that arise by operation of law from the relations of various involved parties under equitable principles." *Citizens Ins Co of America v Buck,* 216 Mich App 217, 225; 548 NW2d 680 (1996). Although caution is indicated, "the mere fact that the doctrine of subrogation has not been previously invoked in a particular situation is not a prima facie bar to its applicability." *Hartford Accident & Indemnity,* 461 Mich at 216 (citation

[4] Overruled on other grounds by *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co,* 500 Mich 191, 203 n 24; 895 NW2d 490 (2017).

[5] Which tells us that rescinding the policy as a matter of contract law does not necessarily eliminate a carrier's statutory obligation under the No-Fault Act, because the rights of innocent third-parties are subject to a "balancing of the equities." See *Pioneer State Mut Ins Co v Wright,* ___ Mich App ___; ___ NW2d ___ (2020) (Docket No. 347072); slip op at 7.

omitted). It is well-established that the subrogee acquires no greater rights than those possessed by the subrogor, and that the subrogee may not be a "mere volunteer." *Auto-Owners Ins Co v Amoco Prod Co*, 468 Mich 53, 59; 658 NW2d 460 (2003). However, "[w]hen an insurance provider pays expenses on behalf of its insured, it is not doing so as a volunteer." *Id.* (citation omitted).

The Court of Appeals further noted that if Esurance's claim is viewed in reference to the then-existing policy, then equitable subrogation still would not be available because "[i]f the policy exist[ed], … equitable subrogation fails as a matter of law because Roshaun could not have pursued benefits from" the MAIPF. (Appx 11a.) The Court of Appeals seems to have assumed that if rescission were taken out of the equation, Esurance would have been the responsible carrier. (See Id.) Not so. Even if Esurance had not rescinded the policy, Esurance simply did not fall within the order of priority for Roshaun's claim under a plain reading of MCL 500.3114. (See Appx 67a-68a.) In first-party no-fault cases, priority among potentially responsible insurers is governed by MCL 500.3114(1). This provision creates a general rule that persons injured in a motor vehicle accident look to their own insurance first. *Michigan Mut Ins Co v Farm Bureau Ins Group*, 183 Mich App 626, 630; 455 NW2d 352 (1990).

"Normally, a person who sustains an accidental bodily injury in a motor vehicle accident must first look to no-fault insurance policies in his household for no-fault benefits." *Id.* "No-fault policies in the household are first in order of priority of responsibility for no-fault benefits, regardless of whether the injured person was, or was not, an occupant of a motor vehicle at the time of the accident." *Id.* Only when "there is no policy in the injured person's household" do claimants look to "other insurers." *Id.* "[I]t is the policy of the no-fault act that persons, not motor vehicles, are insured against loss." *Lee v DAIIE*, 412 Mich 505, 509; 315 NW2d 413

(1982). It is "the purpose of the no-fault act" that "individuals will insure their own personal protection with their own no-fault policies. They will first look to their own insurer before having to rely on whether any other party involved has insurance to cover their losses." *Madar v League Gen Ins Co*, 152 Mich App 734, 741; 394 NW2d 90 (1986). The Legislature "intended that injured persons who are insured … for no-fault benefits would have primary resort to their own insurer." *Corwin v DaimlerChrysler Ins Co*, 296 Mich App 242, 262; 819 NW2d 68 (2012).

Here, Esurance did not insure Roshaun, his spouse, or anyone residing in his household. The named insured under Esurance's *Colorado* policy was Luana Edwards-White – and there is no indication in the record that Roshaun lived with her at any times relevant to this claim. (See Appx 67a-68a.) Since Esurance's insured did not reside in Roshaun's household, MCL 500.3114(1) did not place Esurance in the order or priority. So Roshaun's claim would fall to "[t]he insurer of the owner or registrant of the vehicle occupied." MCL 500.3114(4)(a) (emphasis added). Again, "the owner or registrant of the vehicle occupied" was Anthony White II, and Esurance was not his insurer. This subpart is keyed to the *person* ("the insurer of the owner or registrant"), not the *vehicle*. See *Dobbelaere v Auto Owners*, 275 Mich App 527, 533-534; 740 NW2d 503 (2007). So we look next to MCL 500.3114(4)(b), "[t]he insurer of the operator of the vehicle occupied." Again, this was Roshaun, and Esurance was not his insurer. Esurance asserted this argument in response to the MAIPF's motion, and the MAIPF did not dispute this in its reply. (Appx 86a-89a.)

So if we take rescission out of the equation, Esurance simply paid Roshaun's claim in error. An insurer that pays based on a mistaken understanding of the order of priority has long been recognized to a cause of action in equitable subrogation. See *Titan Ins v N Pointe Ins*, 270 Mich App 339, 343-344; 715 NW2d 324 (2006). The only thing different about this case is

that there is no *insurer* for Esurance to sue. But that is because the MAIPF did not assign an insurer. Recent case law is replete with examples of claimants suing these Defendants to compel an assignment. See *Michigan Head & Spine, et al. v MAIPF*, ___ Mich App ___; ___ NW2d ___ (2018) (Docket No. 344955). So some cause of action clearly exists – regardless of whether the claim is "analyzed under the circumstances that existed when benefits were paid, which was before the policy was rescinded, or … through the lens that the policy never existed in the first place" (Appx 11a) – and dismissal with prejudice under MCR 2.118(C)(8) was erroneous.

CONCLUSION AND RELIEF REQUESTED

Here, Esurance paid on a very significant no-fault claim and later found evidence that the policy had been procured through fraud. (See Appx 80a.) Esurance obtained a judgment against both its insured and the injured person, declaring the policy "void *ab initio* for misrepresentation and fraud in the application for insurance." (Id.) With no existing policy, the injured person – an innocent third-party (see Appx 66a-67a) – should have looked to redress from the MAIPF. Esurance paid based on a mistake, no different than the more typical equitable subrogation scenario where a carrier pays and then discovers a higher-in-priority in the claimant's household,

for example. Yet Esurance has been denied any remedy, and has instead been forced to play "whack-a-mole" with the ever-evolving reasons for why the suit should be dismissed.[6]

For these reasons discussed above and in more detail in its Application, Esurance respectfully requests that this Honorable Supreme Court grant this Application for Leave to Appeal or in the alternative, that this Court peremptorily reverse and remand to the Wayne County Circuit Court.[7]

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[6] The MAIPF initially moved for summary disposition solely on the grounds that it was (supposedly) not an entity that could be sued. (Appx 34a-38.) This is not true; the MAIPF can be sued. See *Mullen v Progressive Marathon Insurance,* unpublished opinion per curiam of the Court of Appeals, issued October 22, 2020 (Docket No. 350015), pp 6-9 (Appx 137a-140a). The trial court – apparently assuming that the MAIPF was capable of being sued – granted the MAIPF's motion on the grounds that the No-Fault Act did not expressly provide for equitable subrogation against the MAIPF. (Appx 25a-27a.) This was despite the fact that equitable subrogation is not expressly provided for in the No-Fault Act *against anyone*, yet it has been allowed for decades. See *Allstate Ins Co*, 118 Mich App at 603-604. Moreover, this Court held in *Auto-Owners*, 468 Mich at 63 that the lack of a "yes" in a statute does not equate to a prohibition on equitable subrogation. Then, the Court of Appeals affirmed based on the "either volunteer or highest in priority insurer" reasoning discussed above. (Appx 10a-11a.)

[7] In addition to the reasons stated in the Application, the need for clarification, as to when a no-fault carrier pays as a "volunteer" for subrogation purposes, was recently illustrated by *Ravenell v NGM Insurance,* unpublished opinion per curiam of the Court of Appeals, issued October 15, 2020 (Docket No. 348436) (Appx 124a). In *Ravenell*, the panel followed *Esurance,* ___ Mich App at ___; slip op at 6 and denied the carrier any recovery for PIP benefits it mistakenly paid.